

D.P.U. 89-DS-19

Adjudicatory hearing in the matter of a possible violation of General Laws Chapter 82, Section 40, by John Mahoney Construction Company, Incorporated.

APPEARANCE: Mario Reid, Compliance Officer
Gail Soares, Dig-Safe Investigator
Division of Pipeline Engineering and Safety
Department of Public Utilities
Boston, Massachusetts 02202
FOR: THE DIVISION OF PIPELINE
ENGINEERING AND SAFETY

I. INTRODUCTION

On November 1, 1989, the Division of Pipeline Engineering and Safety ("Division") of the Department of Public Utilities ("Department") issued a Notice of Probable Violation ("NOPV") to John Mahoney Construction Company ("Respondent"). The NOPV stated that the Division had reason to believe that on June 20, 1989, the Respondent performed excavations at 92, 94, and 96 East Brookline Street, Boston, in violation of G.L. c. 82, § 40 ("Dig-Safe Law"). The Respondent allegedly failed to exercise reasonable precautions, causing damage to underground facilities operated by Boston Gas Company ("Boston Gas" or "Company").

On November 16, 1989, the Respondent replied by letter, stating that it had not violated the Dig-Safe Law. In the letter, the Respondent asserted that it had obtained valid Dig-Safe numbers, maintained the Company's markings, and had located all underground facilities by hand. In a letter dated December 4, 1989, the Division informed the Respondent of its determination that the Respondent had violated the Dig-Safe Law and of its right to request an adjudicatory hearing.

On December 7, 1989, the Respondent requested an adjudicatory hearing pursuant to 220 C.M.R. § 99.07(3). On March 21, 1991, the Department sent due notice to the Respondent regarding an adjudicatory hearing. A second hearing notice was sent to the Respondent on April 18, 1991. After a second postponement, a third hearing notice was sent to the Respondent on September 5, 1991. After this notice, an adjudicatory hearing was held on October 8, 1991 pursuant to the Department's procedures for enforcement under 220 C.M.R. § 99.00 et seq. At the hearing, Mario Reid, a compliance officer for the Division, represented the Division and

presented two witnesses. No one appeared in behalf of the Respondent at the hearing.

On October 11, 1991, the Department sent a letter to the Respondent informing the Respondent that to avoid dismissal of its appeal it would have to provide a written explanation to the Department showing good cause for its failure to appear no later than October 21, 1991. On October 21, 1991, the Department received a letter from the Respondent requesting a second hearing on the basis that the Respondent's scheduled hearing representative had been recently laid off, and that he had overlooked finding a replacement to appear on the Respondent's behalf. On February 2, 1993, the Department scheduled a second hearing for March 5, 1993. On February 26, 1993, the Department postponed further hearings indefinitely due to the occurrence of a personnel strike at Boston Gas Company.

On September 28, 1993, after the strike at Boston Gas had ended, the Department sent a hearing notice to the Respondent, return receipt requested, to inform the Respondent of the rescheduled adjudicatory hearing to be held on October 28, 1993. That notice also informed the Respondent that a failure to appear would result in dismissal of the Respondent's appeal and enforcement of the previous decision. On October 2, 1993, a signed receipt for the letter was returned to the Department. On October 28, 1993, an adjudicatory hearing was held at the Department.

At the hearing, no one appeared in behalf of the Respondent. At the hearing, Gail Soares, a Dig-Safe investigator for the Division, appeared on behalf of the Division and presented two witnesses. At that time, Ms. Soares requested that the case be dismissed and that the prior penalties be re-instituted. As of November 3, 1993, the Department had not been contacted by

the Respondent.

II. STANDARD OF REVIEW

According to Department precedent, if a Respondent fails to appear at a properly noticed adjudicatory hearing, the Department has reason to dismiss the Respondent's case on grounds "that the Respondent has failed to pursue its claim," therefore reinstating the prior determination of the Division. Masachi Engineering Corporation, D.P.U. 86-DS-117 (1993); J.P.T Excavators, D.P.U. 91-DS-47 (1993); Signal Construction Company, D.P.U. 89-DS-95 (1990); Paul Marusare, D.P.U. 87-DS-85 (1988).

In cases where several possible violations occur at multiple sites and are cited in a single case, the Department reserves the right to treat those instances as a single violation or multiple violations. In a de novo adjudicatory hearing, the Department is not limited to the factual characterizations used in reaching the previous decision rendered by the Division after the informal conference. See Todesca Equipment Company, Inc., D.P.U. 90-DS-49 (1992); Mario Suzi & Sons, D.P.U. 87-DS-86 (1991). In addition, in instances where a party has failed to appear at one or several scheduled adjudicatory hearings and is found to have failed to pursue its claim, the Department has held that the maximum allowable civil penalty of \$1,000 may be imposed. See DiGregorio Construction Company, D.P.U. 87-DS-179 (1990).

III. ANALYSIS AND FINDINGS

In this case, the Department has followed due process as defined in 220 C.M.R. § 99.00 et seq. by: scheduling an informal conference, issuing a remedial order, informing the Respondent of its rights to an adjudicatory hearing, and by holding two adjudicatory hearings as defined in G.L.

c. 30A and providing timely notice of those hearings to the Respondent. In those notices, the Department informed the Respondent that a failure to attend the hearing would result in dismissal of the appeal and enforcement of the prior informal decision, but the Respondent still failed to appear at both scheduled hearings. Accordingly, because the Respondent failed to appear at both adjudicatory hearings and failed to contact the Department after the second hearing, the Department finds that the Respondent has failed to pursue its claim.

In regard to the amount of the civil penalty to be imposed upon the Respondent, the Department has wide latitude due to the de novo nature of the adjudicatory hearing. In the instant case, the Respondent failed to pursue its claim, and also had multiple incidents within a single case, either of which alone could have caused the Department to impose the maximum civil penalty allowed upon the Respondent. Therefore, the Respondent's appeal is dismissed, with prejudice, and the previous informal decision is reinstated with the maximum civil penalty allowed.

IV. ORDER

Accordingly, after due notice, hearing, and consideration, the Department

FINDS: That John Mahoney Construction Company, Incorporated failed to pursue its claim and it is

ORDERED: That John Mahoney Construction Company, Incorporated, being a repeat violator of the Dig-Safe Law,¹ shall pay a civil penalty of \$1,000 to the Commonwealth of Massachusetts by submitting a check or money order in that amount to the Secretary of the Department of Public Utilities, payable to the Commonwealth of Massachusetts, within 30 days of the date of this order.

By Order of the Department,

¹ Repeat offenders of the Dig-Safe Law are parties that have signed consent orders, or been found to have violated the Dig-Safe Law in a remedial order issued by the Division, or an adjudicatory decision issued by the Department. The Respondent has been found to have violated the Dig-Safe Law in the following cases: D.P.U. 86-DS-107, D.P.U. 87-DS-116, D.P.U. 88-DS-45, D.P.U. 89-DS-117, D.P.U. 90-DS-61, D.P.U. 92-DS-29, D.P.U. 92-DS-30, D.P.U. 92-DS-31, and D.P.U. 92-DS-32.